THE DOCTRINE OF INDISPENSABLE PARTIES AS APPLIED IN REVIEW OF ADMINISTRATIVE ACTION

The convenience of a plaintiff who seeks judicial review of federal administrative action is best served by allowing the suit to be maintained in his local judicial district. However, in situations where the place of suit is not provided for by statute, local review [1] may be barred. The doctrine of sovereign immunity requires these suits to be brought against administrative officials as individuals, rather than as representatives of the Government,[2] and thus the party theories applicable to private suits are extended to review of administrative action. If suit is instituted only against the subordinate whose conduct directly affects plaintiff, the court may find that the administrative superior is an indispensable party. The suit will then have to be brought in the District of Columbia, where the court has jurisdiction over the principal officer of the agency by reason of his official residence [3] and the requirement of the general venue statute [4] can be fulfilled.[5]

In strictly private suits, the difficulty of creating a general rule which would minimize the handicaps and expense of litigating in a strange district has led to the venue requirement that actions be brought in the district where the defendants reside, thus placing the probable burden upon him who initiates the proceeding. Similarly, inability to join a private party whom the court deems indispensable to a definitive and fair resolution of the controversy presents another difficult choice; but again the burden is on plaintiff, whose failure to join an indispensable party will lead to dismissal of the suit.[6]

Whatever their merit in private litigation, application of these requirements to suits for review of administrative decisions produces an

1. The terms "local" and "locally" will be used in this Note to mean "outside the District of Columbia."

2. See text at and following note 62 *infra*.

3. Personal service on an officer or agency of the United States is required by Federal Rule of Civil Procedure 4(d)(5). See Trost v. Ewing, 13 F.R.D. 432 (W.D. Pa. 1953). Process other than a subpoena does not extend beyond the territorial limits of the state in which the district court is held except "when a statute of the United States so provides." FED. R. CIV. P. 4(f).

4. "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law." 28 U.S.C. § 1391(b) (1952).

5. The development of the subject matter of this Note through the years may be traced in 4 U. OF CHI. L. REV. 342 (1937); Notes, 50 HARV. L. REV. 796 (1937), 50 YALE L.J. 909 (1941), 23 IND. L.J. 305 (1948), 54 COL. L. REV. 1128 (1954).

6. Often quoted is the general definition of indispensable parties expressed in Shields v. Barrow, 17 How. 130, 139 (U.S. 1855): "Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." See Note, 65 HARV. L. REV. 1050 (1952), for discussion of the application of the doctrine generally and in relation to administrative law; see also 3 MOORE, FEDERAL PRACTICE 2144-55 (1948).

inequitable situation. Centralization of review in Washington, D.C., handicaps the average plaintiff significantly as well as increases his expenses, even though in the majority of cases judicial review is limited to the record of a previous administrative proceeding. If new testimony of plaintiff or his witnesses can be introduced, the burden is even more severe; the nominal right to review may prove financially infeasible. On the other hand, the network of United States attorneys throughout the nation would permit effective local presentation of the defense.[7]

These practical considerations have not been employed in judicial formulation and application of the test for determining indispensability of federal officials. Examination of the resulting procedural morass in several classes of cases and of the unique capacity of the Government to defend locally will form the basis for suggested remedial legislation to extend local review to situations not covered by a special provision of the type found in many major federal regulatory statutes.[8]

THE TEST OF INDISPENSABILITY: *Williams v. Fanning*

In *Williams v. Fanning*,[9] decided in 1947, the Supreme Court set forth the formula for determining the indispensability of federal officials. After a hearing in Washington, D.C.,[10] at which evidence was presented of fraudulent practices in the business plaintiff conducted through the mail, the Postmaster General signed a "fraud order" [11] directing the local post-

7. See text at and following note 84 *infra*.

8. Typical of special statutory provisions for review is that contained in the Federal Trade Commission Act: "Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business. . . ." 38 STAT. 719 (1916), as amended, 15 U.S.C. § 45(c) (1952). Basically the same pattern is found in the Securities Act of 1933, 48 STAT. 80 (1933), as amended, 15 U.S.C. § 77i (1952); the Securities Exchange Act of 1934, 48 STAT. 901 (1934), as amended, 15 U.S.C. § 78y (1952); the Public Utility Holding Company Act of 1935, 49 STAT. 834 (1935), as amended, 15 U.S.C. § 79x (1952); the Federal Power Act, 49 STAT. 860 (1935), 16 U.S.C. § 8251(b) (1952); the Federal Alcohol Administration Act, 49 STAT. 978 (1935), as amended, 27 U.S.C. § 204(h) (1952); the National Labor Relations Act, 49 STAT. 455 (1935), as amended, 29 U.S.C. § 160(f) (1952) and the Fair Labor Standards Act of 1938, 52 STAT. 1065 (1938), as amended, 29 U.S.C. § 210 (1952) as to certain portions of their subject matter; the Natural Gas Act, 52 STAT. 831 (1938), 15 U.S.C. § 717r(b) (1952); the Civil Aeronautics Act of 1938, 52 STAT. 1024 (1938), as amended, 49 U.S.C. § 646 (1952); the Food and Drugs Act, 52 STAT. 1055 (1938), as amended, 21 U.S.C. § 371f (1952); a special provision granting local review of certain orders by the Federal Communications Commission, by the Secretary of Agriculture under the Packers and Stockyards Act and the Perishable Agricultural Commodities Act, and by the United States Maritime Commission, 64 STAT. 1130 (1950), 5 U.S.C. § 1034 (1952).

9. 332 U.S. 490 (1947).

10. See text at note 82 and note 82 *infra* for discussion of the importance of decentralized administrative hearings.

11. 26 STAT. 466 (1890), 39 U.S.C. § 732 (1952). Normally, the Postmaster General relies on the findings and recommendations of subordinates. See text following note 86 *infra*.

master in Los Angeles to refuse payment on any money orders addressed to plaintiff and to stamp all letters "fraudulent" and return them to the senders. Plaintiff's suit against the subordinate in the local district court to enjoin enforcement of the order was dismissed for failure to join the Postmaster General, though the judge commented that he found no substantial evidence to support the superior's order.[12] The circuit court affirmed, following its earlier decisions in analogous cases.[13] The Supreme Court's reversal was based on the following test: ". . . the superior officer is an indispensable party if the decree granting the relief sought will require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him." [14] The superior was deemed not indispensable ". . . if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." [15]

The Court adhered to this formula in *Hynes v. Grimes Packing Co.*[16] The Secretary of the Interior, after setting aside certain land and waters in Alaska as an Indian reservation, promulgated a regulation which prohibited commercial fishing in those waters except by natives or their licensees. The district court enjoined a Regional Director of the Department of the Interior from enforcing the regulation against the plaintiff. The Supreme Court held that the Secretary of the Interior was not an indispensable party because, as in *Williams,* the superior would not have to perform any act either directly or indirectly. An injunction against the Regional Director would protect plaintiff from interference with its fishing and the threatened seizure of its boats and equipment.

The Supreme Court qualified these decisions by emphasizing that the decrees sought would not require active concurrence of the superiors. But this fact would not have changed the practical result of these two cases: freeing the plaintiffs from restraint and frustrating the regulatory efforts of the department by prohibiting execution of a still outstanding order. Thus, the Court's test places a premium upon procedural devices. Plaintiff may utilize local review to nullify agency action only by carefully framing a request for relief which will not require action by the superior. Close analogy to *Williams* has resulted in the availability of local review in subsequent cases involving postal authorities,[17] but the results in other types of cases have been less consistent and less satisfactory.

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12. Report of Proceedings in district court, Brief for Petitioner, Appendix p. 3, on petition for certiorari, Williams v. Fanning, 331 U.S. 797 (1947).

13. 158 F.2d 95 (9th Cir. 1946). The earlier cases were Dolphin v. Starr, 130 F.2d 868 (9th Cir. 1942) and Neher v. Harwood, 128 F.2d 846 (9th Cir. 1942).

14. Williams v. Fanning, 332 U.S. 490, 493 (1947).

15. *Id.* at 494.

16. 337 U.S. 86 (1949).

17. See, *e.g.,* Stanford v. Lunde Arms Corp., 211 F.2d 464 (9th Cir. 1954); Pinkus v. Reilly, 170 F.2d 786 (3d Cir. 1948). But see Payne v. Fite, 184 F.2d 977 (5th Cir. 1950).

APPLICATION OF THE *Williams* TEST

Alien Deportation Cases.—The rule of *Williams v. Fanning* has had frequent application in two types of cases involving aliens. In the first class of cases, aliens seek review of deportation orders. Usually they challenge the factual basis of the administrative determination or charge that procedural irregularities deprived them of their constitutional or statutory rights.[18]

In *Navarro v. Landon*,[19] an alien sued in the local district court to enjoin the District Director from enforcing a deportation order issued by the Commissioner of Immigration and Naturalization, whose official residence is in Washington, D.C.[20] The superior was held not indispensable since "the decree in order to be effective need not require the Commissioner to do a single thing."[21] This was a correct application of the Supreme

18. These decisions remain valuable despite a subsequent Supreme Court holding in Heikkila v. Barber, 345 U.S. 229 (1953), that the writ of habeas corpus was the only proper avenue for protest of orders under the Immigration Act of 1917, 39 STAT. 874 (1917), as amended, 8 U.S.C. § 1 *et seq.* (1946), so that the suits should have been dismissed even if they had been initiated in the District of Columbia. In interpreting the Immigration and Nationality Act of 1952, 66 STAT. 163, 8 U.S.C. § 1101 *et seq.* (1952), the Courts of Appeals for the Second Circuit and for the District of Columbia have held that all the orthodox methods of judicial review are now available. Pedreiro v. Shaughnessy, 213 F.2d 768 (2d Cir. 1954), *cert. granted*, 23 U.S.L. WEEK 3133 (U.S. Nov. 16, 1954); Rubinstein v. Brownell, 206 F.2d 449 (D.C. Cir. 1953), *aff'd* by an equally divided court, 346 U.S. 929 (1954). The court relied on indications in the legislative background of the 1952 Act that § 10 of the Administrative Procedure Act was applicable, 60 STAT. 237 (1946), as amended, 5 U.S.C. § 1009 (1952). *Contra:* Batista v. Nicolls, 213 F.2d 20 (1st Cir. 1954). Prior to these decisions, the availability of a wider scope of review under the 1952 Act was suggested in *Developments in the Law—Immigration and Nationality*, 66 HARV. L. REV. 643, 702 (1953), and in Note, 62 YALE L.J. 1000, 1006 (1953).

19. 106 F. Supp. 73 (S.D. Cal. 1952).

20. The Immigration Act of 1917 specified no administrative procedure and directed only that certain classes of aliens "shall, upon the warrant of the Attorney General, be taken into custody and deported." 39 STAT. 889 (1917), as amended, 54 STAT. 671 (1940), 8 U.S.C. § 155(a) (1946). Regulations provided for a hearing, 8 CODE FED. REGS. § 150.6 (1949), and for forwarding of the presiding officer's proposed findings and order to the Commissioner of Immigration and Naturalization, 8 CODE FED. REGS. § 150.9 (1949), who was authorized to issue the order of deportation; this however, could be appealed to the Board of Immigration Appeals, 8 CODE FED. REGS. § 90.3 (1949).

The Immigration and Nationality Act of 1952 does outline certain procedures, including a provision that a "special inquiry officer shall conduct proceedings . . . to determine the deportability of any alien, and . . . as authorized by the Attorney General, shall make determinations, including orders of deportation." 66 STAT. 209, 8 U.S.C. § 1252(b) (1952). A substantial change has been made in the regulations. Whereas formerly the officer who presided at the initial hearing only recommended an order to the Commissioner, the order of the special inquiry officer is now final, 8 CODE FED. REGS. § 242.61(e) (1952), unless appealed to the Board of Immigration Appeals, 8 CODE FED. REGS. § 6.1(b) (1952). Since the Commissioner seems to have been removed from the direct line of these decisions, presumably the members of the Board of Immigration Appeals are the officials who will be claimed to be indispensable in most of the deportation order cases under the 1952 Act. However, the Commissioner is still the official to whom the Attorney General may delegate "any and all responsibilities and authority in the administration of the Service and of [the Immigration] Act," 66 STAT. 173, 8 U.S.C. § 1103(b) (1952), and, in a recent case involving a deportation order under the 1952 Act, the Government argued that the Commissioner and the Attorney General were the indispensable parties. See Pedreiro v. Shaughnessy, 213 F.2d 768 (2d Cir. 1954).

21. 106 F. Supp. 73, 76 (S.D. Cal. 1952).

Court formula and recently, in *Pedreiro v. Shaughnessy*,[22] the Court of Appeals for the Second Circuit reached the same result.[23]

However, most cases have held the Commissioner indispensable.[24] The approach of those courts which have articulated the basis for distinguishing *Williams* is typified by *Paolo v. Garfinkel*,[25] which emphasized the following language from *Williams:* "if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court," [26] the superior need not be joined. In *Williams*, an injunction against the local subordinate would provide effective relief because plaintiff would probably confine his business headquarters to the one judicial district. But an alien would be less likely to restrict his movements to a single district, and thus the *Paolo* court reasoned that an injunction not binding in every district could not afford effective relief. This draws an unwarranted limitation from the language of *Williams;* the sounder conclusion was expressed in *Navarro v. Landon:*

> "This court may not compel the plaintiff to anticipate that he will change his residence to another district and be confronted by an order of the Commissioner directing the director of that district to deport him. The term 'relief desired' as used in Williams v. Fanning can only mean relief desired by the plaintiff. . . . If the defendant de-

22. 213 F.2d 768 (2d Cir. 1954), *cert. granted*, 23 U.S.L. WEEK 3133 (U.S. Nov. 16, 1954). Apparently the grant of certiorari embraces the indispensability issue as well as the basic question, discussed in note 18 *supra*, of availability of review by means other than habeas corpus.

In attempting to demonstrate that the District Director's functions in the matter were not of a purely ministerial nature, the circuit court opinion ascribed undue significance to a change in the regulations whereby that officer is authorized to issue a warrant of deportation and make determinations incidental thereto. Issuance of the warrant is required in "any case in which an order of deportation becomes final," 8 CODE FED. REGS. § 243.1 (1952), and the determinations referred to consist of designating the country to which the alien will be deported and deciding who shall pay the expense. This does not constitute participation by the District Director in the basic order of deportation which the alien challenges. A more significant change to indicate a decentralization of authority is that described in note 20 *supra* whereby the decision of the Special Inquiry Officer on the order of deportation is now final, subject to appeal to the Board of Immigration Appeals.

23. The following cases are in accord with *Navarro* and *Pedreiro:* Yanish v. Phelan, 86 F. Supp. 461 (N.D. Cal. 1949); Yanish v. Wixon, 81 F. Supp. 499 (N.D. Cal. 1948); *cf.* Torres v. McGranery, 111 F. Supp. 241 (S.D. Cal. 1953); United States *ex rel.* Cammarata v. Miller, 79 F. Supp. 643 (S.D.N.Y. 1948); *see* Ragni v. Butterfield, 115 F. Supp. 953 (E.D. Mich. 1953).

24. Rodriguez v. Landon, 212 F.2d 508 (9th Cir. 1954); Paolo v. Garfinkel, 200 F.2d 280 (3d Cir. 1952), *affirming* 106 F. Supp. 279 (W.D. Pa. 1952); Belizaro v. Zimmerman, 200 F.2d 282 (3d Cir. 1952); Slavik v. Miller, 184 F.2d 575 (3d Cir. 1950); Podovinnikoff v. Miller, 179 F.2d 937 (3d Cir. 1950); Corona v. Landon, 111 F. Supp. 191 (S.D. Cal. 1953); McKenzie v. Shaughnessy, 15 F.R.D. 146 (S.D.N.Y. 1953); Birns v. Commissioner of Immigration and Naturalization, 103 F. Supp. 180 (N.D. Ohio 1952); Medalha v. Shaughnessy, 102 F. Supp. 950 (S.D.N.Y. 1951). In Connor v. Miller, 178 F.2d 755 (2d Cir. 1949), a petition for review of a deportation order was dismissed on the ground that the district court had no jurisdiction over the Attorney General or the Commissioner of Immigration and Naturalization, who were named as defendants.

25. 200 F.2d 280 (3d Cir. 1952).

26. *Id.* at 281. Williams v. Fanning, 332 U.S. 490, 494 (1947).

sists in his efforts to deport the plaintiff, the matter is at an end. That is all the relief the plaintiff seeks." [27]

A second argument urged as demonstrating the Commissioner's indispensability points to the nature of a District Director's duties in arresting and deporting an alien: "This is the ministerial act of a subordinate officer. An attack on it could not bring up for determination the validity of the warrant of arrest and of the orders of the Commissioner under which a particular district director might take the deportee into custody." [28] Of course, this overlooks the equally ministerial duties of the local postmaster in *Williams,* a point which the Government stressed in that case, asserting that he did not participate in issuance of the order and might not even know its basis.[29]

In the second class of deportation cases, plaintiff does not contest his status as a deportable alien but seeks only the privilege of suspension of deportation, which lies within the discretion of the Attorney General.[30] In *Chavez v. McGranery* [31] the court recognized a constitutional right of plaintiff to a judicial hearing of his allegation that denial of procedural due process had deprived him of the exercise of the Attorney General's discretion. However, the ultimate holding was that a decree requiring the Attorney General to exercise that discretion could not be granted by a court with no jurisdiction over him. This presents an enlightening contrast in treatment of the *Williams* test by the same district court which, in *Navarro v. Landon,*[32] did not deem the superior indispensable to enjoining the execution of a simple deportation order. Both *Williams* and *Navarro* were distinguished validly because the desired decree ordering the exercise of discretion "requires affirmative action on the part of the District Director's superior." [33]

27. 106 F. Supp. 73, 75-76 (S.D. Cal. 1952).

28. Corona v. Landon, 111 F. Supp. 191, 195 (S.D. Cal. 1953).

29. Brief for Respondent, p. 37, Williams v. Fanning, 332 U.S. 490 (1947). One of the Department's trial examiners conducts the initial hearing. 39 CODE FED. REGS. § 151.4 (Cum. Supp. 1953). See text at note 88 *infra.*

30. Immigration Act of 1917, 39 STAT. 889 (1917), as amended, 54 STAT. 671 (1940), 8 U.S.C. § 155(c) (1946). Immigration and Nationality Act of 1952, 66 STAT. 214, 8 U.S.C. § 1254 (1952). Again, as in the case of orders of deportation, see note 20 *supra,* the change in regulations now makes final the order of a Special Inquiry Officer denying suspension of deportation, 8 CODE FED. REGS. §§ 244.2, 242.61(e) (1952), unless appealed to the Board of Immigration Appeals, 8 CODE FED. REGS. § 6.1(b) (1952). Under the 1917 Act, the Presiding Inspector merely forwarded a memorandum of findings to the Commissioner of Immigration and Naturalization, 8 CODE FED. REGS. § 150.10(g) (1949).

31. 108 F. Supp. 255 (S.D. Cal. 1952).

32. 106 F. Supp. 73 (S.D. Cal. 1952). See text at note 19 *supra.*

33. Chavez v. McGranery, 108 F. Supp. 255, 258 (S.D. Cal. 1952). The contrast in treatment of the two classes of cases is emphasized further by the disposition of *Navarro v. Landon* in a later proceeding. After the first decision involving only the injunction against deportation, the alien filed an amended complaint admitting his deportable status and requesting an order to compel suspension of deportation. The court held him ineligible for suspension, but said the complaint as amended should be dismissed anyway for the same reasons given in *Chavez v. McGranery.* Navarro v. Landon, 108 F. Supp. 922 (S.D. Cal. 1952). See also, Torres v. McGranery, 111 F. Supp. 241 (S.D. Cal. 1953).

In *Vaz v. Shaughnessy*[34] the plaintiff sought a declaratory judgment that he met the statutory eligibility requirements for suspension of deportation. It was suggested that full relief could be granted by enjoining the District Director from enforcing a deportation order until the Immigration and Naturalization Service reopened the hearings and gave plaintiff an opportunity to apply for suspension. This would achieve the same result of keeping the alien in the country, by the same means, preventing the local officer from arresting and deporting him, as in *Navarro*. The idea was rejected in *Vaz* because the court accepted the authorities which regard the superior as indispensable for review of any deportation order; but, if the rationale and methods of *Williams* are accepted, an injunction could be utilized to circumvent indispensability objections in the "suspension" cases.

Although one might anticipate reluctance of courts to intervene to any great extent in a matter left by statute largely to administrative discretion, the issues involved in the "suspension" cases discussed did not differ significantly from those in the simple deportation order cases,[35] and the opinions did not advance the discretion factor as a basis for distinction.[36] Even in somewhat distinguishable "suspension" cases,[37] where plaintiffs challenged the manner in which discretion had been exercised, the primary determination should have been the extent of judicial review to be allowed. Any remedy sanctioned should have been available to the aliens in their local judicial districts.

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34. 112 F. Supp. 778 (S.D.N.Y.), *aff'd*, 208 F.2d 70 (2d Cir. 1953).

35. In the deportation order cases, plaintiff claimed usually that the administrative decision was clearly erroneous or was the result of unconstitutional procedure.

As to the suspension cases, the issue in Chavez v. McGranery, 108 F. Supp. 255 (S.D. Cal. 1952), is stated in text following note 31 *supra*. In the second Navarro v. Landon case, 108 F. Supp. 992 (S.D. Cal. 1952) (see note 33 *supra*) in Vaz v. Shaughnessy, 112 F. Supp. 778 (S.D.N.Y. 1953), *aff'd*, 208 F.2d 70 (2d Cir. 1953), and in Coelho v. Perlman, 115 F. Supp. 419 (E.D.N.Y. 1953), the plaintiffs claimed that the circumstances under which they filed aliens' applications for relief from military service should spare them the usual consequences of ineligibility for United States citizenship, by the terms of the Selective Training and Service Act of 1940, 54 STAT. 885 (1940), as amended, 50 U.S.C. APP. § 303 (1952), and the resultant ineligibility for suspension of deportation under the provisions of the Immigration Act of 1917, 39 STAT. 889 (1917), as amended, 8 U.S.C. § 155 (1946). Navarro claimed he was not a "resident neutral alien," the class subject to military service under the selective service act, at the time he applied for exemption. Vaz contended that he had not understood the legal consequences of claiming exemption. The precise basis of Coelho's complaint is not stated in the report.

36. The circuit court opinion in Vaz v. Shaughnessy, 208 F.2d 70 (2d Cir. 1953), did not rely on the discretion aspect, but in Pedreiro v. Shaughnessy, 213 F.2d 768 (2d Cir. 1954), the court said its holding in *Vaz* "seems distinguishable, as the Vaz case involved an attempt by a concededly deportable alien to review an order holding him not eligible for suspension of deportation, essentially a discretionary matter, whereas here petitioner seeks a review of the record on which is based a final order of deportation, on the ground that his constitutional rights have been infringed." Would the second circuit find sufficient basis for distinguishing the *Chavez v. McGranery* situation solely in the fact that it involved "essentially a discretionary matter," even though the alien alleged denial of procedural due process? See text following note 31 and note 31 *supra*.

37. Avila-Contreras v. McGranery, 112 F. Supp. 264 (S.D. Cal. 1953); Savala-Cisneros v. Landon, 111 F. Supp. 129 (S.D. Cal. 1953).

In evaluating the utility of the deportation cases for analysis of the *Williams* rule, one must consider the Congressional tendency to be relatively ungenerous in the rights accorded aliens, as compared to citizens, and to limit severely aliens' right to judicial review of immigration officials' decisions.[38] However, the opinions discussed in this section are phrased in terms incompatible with the notion that the courts welcomed any plausible ground for warding off the plaintiffs. To the extent that lack of sympathy with aliens or fear of flooding the courts with a multitude of similar pleas may have prompted use of the indispensable party rule as a device of expediency, the deportation cases assume importance of another and somewhat different character. There could be no more mischievous way of disposing of the cases than by developing a complex body of procedural law, thus raising possibly false hopes that a remedy is available in the District of Columbia, and certainly distracting legislators, judges, and attorneys from working out a realistic balance between aliens' rights and the exigencies of necessary regulation.

Government Employment Cases.—A number of cases have interpreted *Williams* as requiring dismissal of local suits for reinstatement to government employment in the typical situation where authority to restore persons to the payroll is vested solely in superior officers.[39] On the other hand, two decisions by local district courts have enjoined subordinates from discharging employees during the pendency of administrative appeals.[40] Before discussing the Second Circuit's reversal of one of these latter cases, *Reeber v. Rossell,*[41] it is well to examine carefully *Blackmar v. Guerre,*[42] the 1952 Supreme Court decision upon which the circuit court relied.

38. "[R]ead against . . . [the] background of a quarter of a century of consistent judicial interpretation, § 19 of the 1917 Immigration Act . . . clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution." Heikkila v. Barber, 345 U.S. 229, 234-35 (1953) (see note 18 *supra*). Section 19 stated: "In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final." 39 STAT. 889 (1917), as amended, 54 STAT. 671 (1940), 8 U.S.C. § 155 (1946). The Immigration and Nationality Act of 1952, 66 STAT. 208, 8 U.S.C. § 1252 (1952), contains practically identical language, but court interpretation of the legislative history has broadened the scope of review. See note 18 *supra.*

39. Money v. Wallin, 186 F.2d 411 (3d Cir. 1951); Daggs v. Klein, 169 F.2d 174 (9th Cir. 1948); Callaway County Agricultural Stabilization and Conservation Comm. v. Missouri Agricultural Stabilization and Conservation Comm., 122 F. Supp. 541 (W.D. Mo. 1954); *accord,* Angilly v. United States, 199 F.2d 642 (2d Cir. 1952), *affirming* 105 F. Supp. 257 (S.D.N.Y. 1952); *see* Henry v. Newman, 110 F. Supp. 955 (E.D. Pa. 1953). *Money* and *Daggs* cited a regulation and a statute respectively which vested in the superior even the authority to discharge.

40. Reeber v. Rossell, 91 F. Supp. 108 (S.D.N.Y. 1950); Farrell v. Moomau, 85 F. Supp. 125 (N.D. Cal. 1949). *But cf.,* McGrimley v. Foley, 89 F. Supp. 10 (D. Mass. 1950), *aff'd,* 180 F.2d 1022 (1st Cir. 1950) (plaintiffs had a weak case on the merits); Martucci v. Mayer, 210 F.2d 259 (3d Cir. 1954) (cited only Blackmar v. Guerre, 342 U.S. 512 (1952), see text at note 42 *infra*).

41. 200 F.2d 334 (2d Cir. 1952). After the superior was held not indispensable, 91 F. Supp. 108 (S.D.N.Y. 1950), the district court gave summary judgment for defendants on the merits, 106 F. Supp. 373 (S.D.N.Y. 1952). The circuit court modified this judgment, holding that the district court had no jurisdiction to pass on the merits in the absence of the superior.

42. 342 U.S. 512 (1952).

Blackmar had been removed from his position as a minor executive in the New Orleans office of the Veterans' Administration and the discharge was given final affirmance by the Board of Appeals and Review of the Civil Service Commission. Plaintiff then instituted suit in a federal district court in Louisiana, naming as defendants both the Veterans' Administration's Regional Manager and the United States Civil Service Commission. He sought judgment "annulling his discharge . . . and the action of the Civil Service Commission confirming [it] . . . and declaring that 'plaintiff is entitled to an order from the United States Civil Service Commission directing . . . [the Regional Manager] to restore plaintiff to his aforesaid position' with back pay." [43] The Supreme Court affirmed dismissal on the grounds that:

> "Since the members of the Civil Service Commission were never served, and could not be served, in the District Court for the Eastern District of Louisiana, and the Civil Service Commission is not a corporate entity, it follows that the only defendant before the court was [the Regional Manager] . . . and, as we have pointed out, no relief could possibly be granted against him in these proceedings. . . ." [44]

Had the *Williams* test been applied, plaintiff would have been barred by virtue of his own petition for an order from the Commission, since the decree granting the relief sought would require the superiors to take action. In view of this complete consistency of *Blackmar* with *Williams* on the facts, and the failure to enunciate a conflicting rule or even to mention the latter case, there seems to be no substantial basis for a construction of *Blackmar* which would remove from the area of permissible local review those instances which *Williams* would authorize.

In the *Reeber* case,[45] the plaintiff sued to enjoin the managers of the Veterans' Administration's New York office from removing him from his position or reducing him in rank or salary. He claimed that the local officers relied on regulations, issued by the Civil Service Commission, which denied him rights guaranteed by the Veterans' Preference Acts.[46] The circuit court's brief opinion did not explain why *Blackmar* was considered clear authority for the decision that the Civil Service Commissioners were indispensable parties to the plaintiff's suit, which sought only relief against subordinates. However, discussion of *Reeber* by the same circuit in a subsequent opinion, *Arbolino v. Shaughnessy*,[47] suggests the view of the

43. *Id.* at 513, 514.

44. *Id.* at 516. It is interesting to note that recently the plaintiff has been awarded damages for loss of salary due to his discharge, because the procedural requirements of the Veterans' Preference Act were violated in the course of his administrative appeal. 120 F. Supp. 408 (Ct. Cl. 1954).

45. Reeber v. Rossell, 200 F.2d 334 (2d Cir. 1952). See note 41 *supra.*

46. 37 STAT. 413 (1912), 5 U.S.C. 648 (1946), repealed, 64 STAT. 1100 (1950); 58 STAT. 387 (1944), as amended, 5 U.S.C. § 851 (1952).

47. 204 F.2d 684 (2d Cir. 1953).

factual situation which may have prompted that decision. It appears from *Arbolino* that the court considered the functions of the local officials in *Reeber* as amounting to no more than the transmission of the superiors' orders, as distinguished from a physical act of independent significance such as the actual impounding of mail by the local postmaster in *Williams*.

The most significant element of the discharge process, aside from communication of the decision to the employee, is authorizing the necessary entries on the records to terminate payment of wages. It seems from the facts as stated in the district court opinion that, in *Reeber*, the local managers may have been the ones who would perform the mechanics necessary to remove plaintiff from the payroll.[48] If that was the fact, the only practical distinction between this and the *Williams* situation would be that in *Reeber* payments to plaintiff could have been cut off at a higher administrative level with relative ease even if the local managers had been enjoined from taking the initiative, whereas in *Williams* it would have been very difficult to intercept plaintiff's mail before it reached the local post office. The situations would be even less distinct as to the portion of the relief sought in *Williams* which consisted of an injunction against refusal to pay money orders, since theoretically the Post Office Department could have placed the local postmaster in a crossfire by refusing to credit his accounts for payments made to the plaintiff.

However, in situations where the employee has already been discharged, normally a superior is the party who must act to reinstate him.[49] The rule applicable to reinstatement cases is extremely important, since frequently an employee's petition to enjoin immediate discharge will be dismissed until exhaustion of administrative remedies has been demonstrated by adverse decision on an appeal within the agency's organization.[50] There is not the same degree of intricacy and conflict in the employment decisions as a whole as in the deportation area, primarily because even a generous interpretation of *Williams* rarely would permit local review. Also, the limited authority of the courts outside the District of Columbia to grant mandatory relief poses another formidable, though undesirable, barrier.[51] There would be occasionally a practical basis for peremptory

48. The local managers made the initial designation of the particular employees who had the lowest veterans' preferences and thus were to be discharged in order to effectuate the general order of the Administrator of Veterans' Affairs that the office force be reduced. See 91 F. Supp. 108, 111 (S.D.N.Y. 1950). Even if the formal functions of discharge would be executed by a superior, it would most likely be by the Administrator of Veterans' Affairs rather than by the Civil Service Commissioners, since the latter had approved the discharge and were not exercising their authority to order different disposition of a case by the employing agency. See 5 CODE FED. REGS. §§ 22.10, 22.11 (Cum. Supp. 1954).

49. See note 39 *supra*.

50. See, *e.g.*, Leeds v. Rossell, 101 F. Supp. 481 (S.D.N.Y. 1951); Breiner v. Wallin, 79 F. Supp. 506 (E.D. Pa. 1948).

51. See McGrimley v. Foley, 89 F. Supp. 10 (D. Mass. 1950), *aff'd*, 180 F.2d 1022 (1st Cir. 1950). See also, Reeber v. Rossell, 91 F. Supp. 108, 111, 113 (S.D.N.Y. 1950) and Farrell v. Moomau, 85 F. Supp. 125, 126 (N.D. Cal. 1949), in which even courts willing to enjoin discharge of employees expressed doubt as to their authority to order reinstatement. See text at and following note 75 *infra*.

dismissal of employees' suits for specific relief, as, for instance, when discharge was prompted by belief that the holder of a confidential post was a security risk; but, to whatever extent employees are to be allowed appeal to the courts, they should not be hampered by unreasonable jurisdictional obstacles.

Other Areas of Decision.—Despite special provision for local review in a great many of the major federal regulatory statutes,[52] the problem of interpreting *Williams* has arisen in a variety of contexts in addition to postal regulation, deportation, and government employment. The interpretation has been liberal but reasonable in those cases which resolved the issue in favor of the private party.[53] On the other hand, some decisions have given a distinctly restrictive interpretation which falls short of realization of the potential of the *Williams* rule.[54] A similar illiberal

52. See note 8 *supra.*

53. See Croton Watch Co. v. Laughlin, 208 F.2d 93 (2d Cir. 1953) (enjoined local collector of customs from acting under an order of the Bureau of Customs to prohibit importation of certain merchandise); Koepke v. Fontecchio, 177 F.2d 125 (9th Cir. 1949) (enjoined Area Rent Director from establishing and enforcing maximum rentals for premises which the court held were not subject to control under the Housing and Rent Act of 1947, contrary to the Housing Expediter's regulations); Belcher Oil Co. v. National Enforcement Comm'n, 114 F. Supp. 377 (N.D. Ga. 1953) (enjoined local officers from continuing hearings and making findings on a complaint issued by the National Enforcement Commission charging violation of the Defense Production Act of 1950); Parker v. Lester, 112 F. Supp. 433 (N.D. Cal. 1953), referring to analysis of *Williams* at an earlier stage of the *Parker* case, 98 F. Supp. 300 (enjoined local Coast Guard officers from enforcing any final order of the Commandant of the Coast Guard excluding plaintiffs from employment as merchant seamen on the ground that they were security risks, unless the administrative procedure preceding the final order was conducted in accordance with the court's directions; the decision goes very far in permitting local review, since the regulations provide that the Commandant must approve the security clearance papers of a seaman before he can be employed, 33 CODE FED. REGS. §§ 6.10-1, 121.13(c) (Cum. Supp. 1953)); Rank v. Krug, 90 F. Supp. 773 (S.D. Cal. 1950) (court asserted its jurisdiction to enjoin local officials of the Bureau of Reclamation from diverting river water in carrying out a Bureau project, but dismissed without prejudice for insufficient evidence); National Radio School v. Marlin, 83 F. Supp. 169 (N.D. Ohio 1949) (regional finance officer of the Veterans' Administration was delaying tuition payments to plaintiff school on the ground that a compromise settlement of certain claims against the Administration required the approval of the national Comptroller in addition to that previously given by other officers of the agency; court granted preliminary injunction against sending the tuition vouchers to the District of Columbia office for a ruling, and directed that the regional officer transmit them to the local office of the Department of the Treasury for immediate payment in accordance with the usual practice; apparently a specific order of a superior was not involved). See also, Jeager v. Simrany, 180 F.2d 650 (9th Cir. 1950), which enjoined a subordinate from conducting a hearing preliminary to cancellation of an alien's certificate of lawful entry. The court relied on a test which was used frequently prior to *Williams,* that a local official may be enjoined from executing an order which the superior lacked authority to issue.

54. See Arbolino v. Shaughnessy, 204 F.2d 684 (2d Cir. 1953) (suit to enjoin district personnel officer of the Immigration and Naturalization Service from transferring certain security officers of the Service from the New York district to a Texas district in accordance with an order of the Commissioner of Immigration and Naturalization; note, however, the court's rationale that the only function of the local officer was to communicate the superior's order, whereas in *Williams* the local postmaster had been performing positive physical acts in withholding mail); Smart v. Woods, 184 F.2d 714 (6th Cir. 1950), *cert. denied,* 340 U.S. 936 (1951) (suit to enjoin Area Rent Director from enforcing an order of the Housing Expediter denying appeal from Area Director's original order establishing maximum rentals

tendency appears in a few cases which distinguish between a petition for a declaratory judgment and a petition seeking merely injunctive relief.[55] Finally, in some situations plaintiffs have been unable to meet the *Williams* test because, just as in the suspension of deportation and employee reinstatement cases, the manner in which internal chains of administrative command were stated by the applicable statute or regulation posed a formal requirement of affirmative action by a superior.[56]

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under the Housing and Rent Act of 1947; did not cite *Williams*); Forrest Harmon & Co. v. Rottgering, 106 F. Supp. 993 (W.D. Ky. 1952) (suit to obtain temporary restraining order against Area Rent Director's enforcement of rent reduction orders pending completion of plaintiff's administrative appeal); American Communications Ass'n v. Schauffler, 80 F. Supp. 400 (E.D. Pa. 1948) (suit by union to enjoin Regional Director from conducting an election scheduled by the National Labor Relations Board in which the union's name was excluded from the ballot because of its failure to file affidavits indicating that there were no Communists among its officers; the court stated that an effective decree would require the Board to take action, because, if the basis of the union's exclusion was held unconstitutional, the union's petition for representation would then be a valid one which the Board would be required by statute to investigate); White v. Douds, 80 F. Supp. 402 (S.D.N.Y. 1948) (involved substantially the same facts as American Communications Ass'n v. Schauffler, *supra,* and relied on a quotation from that opinion; here, however, the plaintiff requested, in addition to an injunction, an order directing the National Labor Relations Board to provide for a hearing); Rogers v. Skinner, 201 F.2d 521 (5th Cir. 1953), *reversing* 100 F. Supp. 198 (N.D. Tex. 1951) (suit to enjoin Regional Director of the Department of Labor and his investigators from advising plaintiff's employees that they were within the coverage of the Fair Labor Standards Act and from encouraging them to institute suit to enforce these alleged rights; the opinion cited Blackmar v. Guerre, 342 U.S. 512 (1952), see text at note 42 *et seq. supra,* for its conclusion that the Secretary of Labor was indispensable, but did not cite *Williams*). See also, Interstate Reclamation Bureau v. Rogers, 103 F. Supp. 205 (S.D. Tex. 1952).

55. In Cha-Toine Hotel Apts. Bldg. Corp. v. Shogren, 204 F.2d 256 (7th Cir. 1953), a petition for a declaratory judgment that certain premises were not subject to rent control under the Housing and Rent Act of 1947 was dismissed on the ground that a decree not binding on the superior could not terminate the controversy. The court emphasized that plaintiff intended to use a favorable decree as estoppel by verdict in any subsequent proceedings, and distinguished the result in *Williams* as not constituting authorization that the superior's order be "vacated by direct judicial review." This underestimates the practical effect of the decision in *Williams,* for there the plaintiff was freed from any further interference on the basis of the same charge unless the Postmaster General were to flaunt a judgment on the merits for plaintiff and appoint a succession of new local postmasters. May v. Maurer, 185 F.2d 475 (10th Cir. 1950), also held that the superior was indispensable when plaintiff sought a declaratory judgment that premises were not subject to rent control, even though plaintiff spelled out, in addition, a request that an Area Rent Director be enjoined from issuing orders. A third example is Carson v. Meador, 120 F. Supp. 260 (S.D. Cal. 1954), which dismissed a petition for a declaratory judgment that plaintiff was entitled to release from all federal parole supervision. See also, Jacobs v. Office of Housing Expediter, 176 F.2d 338 (7th Cir. 1949) and Bryant v. Rucker, 111 F. Supp. 309 (S.D. Ala. 1953), in which petitions for declaratory judgments alone were dismissed, although the courts did not indicate that the result would be different if only an injunction were sought.

Contrast with the above decisions numerous cases which have granted injunctions although the plaintiff sought also a declaratory judgment: *e.g.,* Pedreiro v. Shaughnessy, 213 F.2d 768 (2d Cir. 1954) and Navarro v. Landon, 106 F. Supp. 73 (S.D. Cal. 1952) (alien deportation cases; see text at notes 22 and 19 *supra*); Croton Watch Co. v. Laughlin, 208 F.2d 93 (2d Cir. 1953) (prohibition of importation of merchandise; see note 53 *supra*); Koepke v. Fontecchio, 177 F.2d 125 (9th Cir. 1949) (rent control case; see note 53 *supra*).

56. See Berlinsky v. Woods, 178 F.2d 265 (4th Cir. 1949), *cert. denied,* 339 U.S. 949 (1950) (sought decree ordering the national Housing Expediter to exercise the authority vested in him by the Housing and Rent Act of 1947 to institute pro-

None of the indispensability decisions can be viewed in their proper perspective without considering the fact that they lie in the area in which Congress has not made provision for judicial review. Since the availability of review, and its scope, are the product of decisions by the courts,[57] an important and perplexing issue as to the finality to be accorded the administrative action underlies many of the cases. It is quite likely that in some of the cases an attitude unfavorable to the plaintiff in this regard exerted significant influence on the decision to dismiss.[58] In addition, with the exception of the alien deportation and Government employment areas, all but three[59] of the decisions denying local review sustained other grounds

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ceedings for an injunction against plaintiff's eviction, which was alleged to be in violation of the Act); Sellas v. Kirk, 101 F. Supp. 237 (D. Nev. 1951), *aff'd*, 200 F.2d 217 (9th Cir. 1952), *cert. denied*, 345 U.S. 940 (1953) (sought to enjoin a local officer's reduction of size of herds plaintiff was permitted to graze on public lands, but this would have required the Secretary of the Interior to formulate a new basis of allocation to replace the one which the plaintiff challenged).

In some situations, the nature of the relief sought would necessitate affirmative action by the superior: Fahey v. O'Melveny and Myers, 200 F.2d 420 (9th Cir. 1952) (this decision was incident to underlying suit described by plaintiff as a quasi in rem action to determine title to bank deposits impounded when the Home Loan Bank Board abolished one bank and established another; the basic suit sought to review this reorganization indirectly, and thus the court lacked jurisdiction because effective relief would require the Board to reactivate the first bank, appoint new officers, and redistribute banks among various districts); New York Technical Institute of Maryland v. Limburg, 87 F. Supp. 308 (D. Md. 1949) (suit to enjoin regional officers of the Veterans' Administration from refusing to comply with demands of plaintiff school for tuition payments at rates disapproved by the Administrator of Veterans' Affairs; this relief would amount to requiring the Administrator to approve the higher payments, since as a practical matter it would be necessary to credit the account of the local officer for disbursements to plaintiff; compare this with National Radio School v. Marlin, 83 F. Supp. 169 (N.D. Ohio 1949), note 53 *supra*).

Also, unskillful phrasing of complaints has occasionally emphasized the mandatory nature of the relief requested: *e.g.*, Hospoder v. United States, 209 F.2d 427 (3d Cir. 1953) (requested that the Veterans' Administration be ordered to grant a rehearing on plaintiff's disability claim); Feyerchak v. Hiatt, 7 F.R.D. 726 (M.D. Pa. 1948) (writ of mandamus to compel warden of a federal penitentiary to provide plaintiff with proper medical care or a transfer to a medical center).

57. See DAVIS, ADMINISTRATIVE LAW 812-67 (1951).

58. For example, *compare* the government employment decisions discussed in text at notes 39-51 *supra, with* the extremely limited scope of review asserted in Bailey v. Richardson, 182 F.2d 46, 64 (D.C. Cir. 1950), *aff'd* by an equally divided court, 341 U.S. 918 (1951), and the cases there cited. *Compare* Hospoder v. United States, 209 F.2d 427 (3d Cir. 1953), note 56 *supra, with* Fletcher v. Veterans Administration, 103 F. Supp. 654 (E.D. Mich. 1952), which held that the statute applicable to the two cases, 48 STAT. 9 (1933), 38 U.S.C. §705 (1952), made the decision of the Veterans' Administration final; see the same conclusion as an alternate holding in New York Technical Institute of Md. v Limburg, 87 F. Supp. 308 (D. Md. 1949), note 56 *supra*. *Compare* the NLRB case, American Communications Ass'n v. Schauffler, 80 F. Supp. 400 (E.D. Pa. 1948), note 54 *supra, with* White v. Douds, 80 F. Supp. 402 (S.D.N.Y. 1948), note 54 *supra*, which relied in the alternative on nonreviewability of the question. See Sellas v. Kirk, 101 F. Supp. 237 (D. Nev. 1951), *aff'd*, 200 F.2d 217 (9th Cir. 1952), note 56 *supra*, in which the alternate holding was that the action was nonreviewable because committed solely to agency discretion.

59. See Arbolino v. Shaughnessy, 204 F.2d 684 (2d Cir. 1953) and Smart v. Woods, 184 F.2d 714 (6th Cir. 1950), both note 54 *supra;* Bryant v. Rucker, 111 F. Supp. 309 (S.D. Ala. 1953), note 55 *supra*.

for dismissal, most frequently sovereign immunity [60] or failure to exhaust an administrative remedy.[61] Resolution of these and other underlying issues would be facilitated by eliminating from consideration the distracting and confusing indispensable superior dispute.

Doctrinal Environment of the Indispensable Superior Rule

Sovereign Immunity.—Though not specified in the Constitution, immunity of the Federal Government from suit, in the absence of Congressional consent, has developed firm authority in judicial decision [62] and has been a significant factor in the extension of the indispensability doctrine to suits for review of official action.

Its first and basic effect has been to give continuing stimulus to the concept that these cases constitute suits against the officers as individuals, rather than as representatives of the Government's interest in balancing the rights of the public in general against those of a particular plaintiff. This patent fiction is necessary in the present state of the law to reconcile with the language of sovereign immunity decisions any substantial degree of judicial supervision of administrative action, where judicial review of a particular agency is not authorized specifically by statute.[63] The language of *Larson v. Domestic & Foreign Commerce Corp.*[64] would permit unconsented suits for restraint of federal officials only when plaintiff can demonstrate that the official has acted beyond the statutory limits of his authority or that the statute or order which confers authority is unconstitutional, the theory being that in these situations the conduct complained of is individual, not sovereign, action. On its face this would bar a plaintiff whose principal objection was to an asserted lack of substantial evidence to justify an order, rather than to an over-reaching of statutory authority

60. See Payne v. Fite, 184 F.2d 977 (5th Cir. 1950), note 17 *supra;* Rogers v. Skinner, 201 F.2d 521 (5th Cir. 1953), *reversing* 100 F. Supp. 198 (N.D. Tex. 1951), note 54 *supra;* Hospoder v. United States, 209 F.2d 427 (3d Cir. 1953), Fahey v. O'Melveny and Myers, 200 F.2d 420, 454 (9th Cir. 1952), and New York Technical Institute of Md. v. Limburg, 87 F. Supp. 308 (D. Md. 1949), all note 56 *supra.*

61. See Forrest Harmon & Co. v. Rottgering, 106 F. Supp. 993 (W.D. Ky. 1952) and White v. Douds, 80 F. Supp. 402 (S.D.N.Y. 1948), both note 54 *supra;* May v. Maurer, 185 F.2d 475 (10th Cir. 1950) and Carson v. Meador, 120 F. Supp. 260 (S.D. Cal. 1954), both note 55 *supra.*

62. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949); Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371 (1945); Minnesota v. United States, 305 U.S. 382 (1939); and other cases cited in appendix to dissenting opinion of Frankfurter, J., in *Larson v. Domestic & Foreign Commerce Corp., supra,* which appendix includes also a great many cases illustrating the parallel doctrine of immunity of state governments.

See also Hart and Wechsler, The Federal Courts and The Federal System 1150-80 (1953); Block, *Suits Against Government Officers and the Sovereign Immunity Doctrine,* 59 Harv. L. Rev. 1060 (1946); Notes, 40 Geo. L.J. 289 (1952), 65 Harv. L. Rev. 466 (1952).

63. Even the liberal review provision of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1952), has not eliminated the problem, as is indicated by the statement in Blackmar v. Guerre, 342 U.S. 512, 516 (1952), that the Act is not to be deemed an implied waiver of all governmental immunity from suit.

64. 337 U.S. 682, 689-90 (1949).

or a constitutional defect. In practice, both the Supreme Court and the lower federal courts often have acceded to the theory that an administrative order, determined to have been unsupported by sufficient evidence, represents an act which was beyond the authority of the officer.[65] Also, only rarely has the Government's immunity been decisive against a plaintiff in a Supreme Court case unless he asserted a claim to public funds or Government-held property.[66] This suggests strongly that the decisions turn primarily on the firm pragmatic basis articulated in *Land v. Dollar:* [67] "The 'essential nature and effect of the proceeding' may be such as to make plain that the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration. . . . If so, the suit is one against the sovereign." [68] Still, the fiction of suits against officers as individuals remains an integral part of the expressed rationale of the leading decisions, including *Land v. Dollar.* When the issue shifts to the locale of a concededly permissible suit, this hinders frank recognition of the mere representative capacity in which the official stands as defendant, and deters realistic analysis of the situation in terms of the Government's ability to defend locally with relative ease.

Sovereign immunity has played a second important role through its influence on the form in which the *Williams* test was cast. The *Williams* opinion described the circumstances of three Supreme Court cases [69] which held a superior indispensable and which, the opinion said, evolved the principle that he was indispensable if the decree would require his affirmative action.[70] Only one case was cited in which the Court had found a superior not indispensable, *Colorado v. Toll,*[71] but it was said to have brought the above-mentioned principle "into clearer relief." [72]

> "There the director of national parks had issued regulations forbidding operation in the Rocky Mountain National Park of automobiles for hire. Toll was the superintendent of the park who was enforcing the regulation. A suit to enjoin him was allowed to be maintained without joining his superior, the director, who had promulgated the regulation. That result followed . . . by analogy to those cases which permit a suit against a public official who invades a private right either

65. See, *e.g.,* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 137-40 (1951); Land v. Dollar, 330 U.S. 731, 738 (1947); Croton Watch Co. v. Laughlin, 208 F.2d 93 (2d Cir. 1953); Jeffries v. Olesen, 121 F. Supp. 463, 474 (S.D. Cal. 1954). But see the statement in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 690 (1949), that a claim of error in the exercise of delegated authority is not sufficient to permit suit.

66. See cases cited note 62 *supra.* But see, Wells v. Roper, 246 U.S. 335 (1918); Louisiana v. McAdoo, 234 U.S. 627 (1914).

67. 330 U.S. 731 (1947).

68. *Id.* at 738.

69. Warner Valley Stock Co. v. Smith, 165 U.S. 28 (1897); Gnerich v. Rutter, 265 U.S. 388 (1924); Webster v. Fall, 266 U.S. 507 (1925).

70. For critical comment on the Court's interpretation of these cases, see HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1189-90 (1953).

71. 268 U.S. 228 (1925).

72. Williams v. Fanning, 332 U.S. 490, 493 (1947).

> by exceeding his authority or by carrying out a mandate of his superior. United States v. Lee, 106 U.S. 196; Philadelphia Co. v. Stimson, 223 U.S. 605, 619, 620. In those situations relief against the offending officer could be granted without risk that the judgment awarded would 'expend itself on the public treasury or domain, or interfere with the public administration.' Land v. Dollar, 330 U.S. 731, 738." [73]

Actually, *Toll* disposed of the indispensability issue quite cursorily; the principal problem was one of federal-state conflict over control of roads within the Park. Likewise, the *Lee, Stimson,* and *Dollar* cases, cited in the above quotation from *Williams,* revolved solely around aspects of the sovereign immunity of the United States. Although the *Williams* opinion described the result in *Toll* on the question of indispensability as following by analogy to these cases, the analogy is true only within the context of the fiction of suits against officers as individuals. Viewed more realistically, the practical considerations which should govern a decision on sovereign immunity differ considerably from those which are most relevant to determining whether a plaintiff should be limited to suing in the judicial district of a superior's official residence. The former should depend upon a judgment as to whether the probable repercussions on public property or the administration of law justify total denial of relief; logically, the latter question should not be examined until it is decided that plaintiff does have a right to sue, and then the crucial problems are limited to such factors as the ability of the Government to defend locally, the necessity for the superior's participation in the suit, and, should his participation happen to be necessary, the likelihood of undue interference with performance of his official duties if he was required to appear in a local district.

Williams does, however, foster a true kinship of theory between the sovereign immunity and indispensability cases by engrafting a second fiction upon that of regarding a suit for review as directed only against an individual officer.[74] When the petition can be framed to fit the *Williams* test, it is to be treated as involving only the subordinate. Likelihood of excessive interference with public property or the administration of law is a valid consideration in review of administrative action, but this substantive issue is merely beclouded by analysis of suits as against individual

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73. *Ibid.*

74. Merger of language and reasoning of the sovereign immunity and indispensable party doctrines was not new with *Williams.* Often, dismissal of an action had been phrased in terms of the indispensability of the United States as a party and the bar against joining it. See, *e.g.,* Mine Safety Appliances Co. v. Forrestal, 326 U.S. 371, 373 (1945); Minnesota v. United States, 305 U.S. 382, 386 (1938); Block, *op. cit. supra* note 62, at 1065-66.

Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 691 n.11 (1949), provides an example of the parallel between the two doctrines: "Of course, a suit may fail, as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property."

officers. The confusion is compounded by further extension of analogous conceptualism through the doctrine of indispensable superiors.

Limited Authority to Grant Relief in the Nature of Mandamus.—A second factor impeding review of administrative action has been the lack of authority in the federal district courts outside the District of Columbia to issue original writs of mandamus.[75] The problem has not been affected by Federal Rule 81(b), which eliminated the writ of mandamus from the federal procedural system but provided for the grant of equivalent relief in the same circumstances.[76] In practice, the courts often circumvent their lack of authority by granting a mandatory injunction to accomplish the purposes of mandamus,[77] although theoretically this practice is barred by an early Supreme Court holding [78] that the equivalent of mandamus, which was historically a remedy "at law," cannot be obtained in equity.

Thus, any prayer for relief which exceeds the limits of *Williams* by seeking to compel affirmative action by a superior also is vulnerable, except in the District of Columbia, on orthodox doctrine that the court has no power to grant relief in the nature of mandamus. This has, in fact, been held an alternate ground for dismissal in a number of cases finding a superior indispensable.[79] Further, strict interpretation of the mandamus ban would prevent a local district court from compelling even a subordinate to take affirmative action, and would bar the result in the *Williams* case

75. McIntire v. Wood, 7 Cranch 503 (U.S. 1813), provided the basis for this denial of original mandamus jurisdiction by interpreting § 14 of the Judiciary Act of 1789, [see 28 U.S.C. § 1651(a) (1952) and Legislative History] as delegating the power of mandamus only to the extent necessary to the exercise of jurisdiction obtained initially by the courts on an independent ground. Kendall v. United States, 12 Pet. 524, 618-25 (U.S. 1838), noted the absence of the problem of federal-state allocation in interpretation of the authority of District of Columbia courts, and found the source of a broader mandamus power in the common law jurisdiction of Maryland, which they inherited, and in the provisions of an 1801 statute. This development is analyzed in HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1180-87 (1953). See also DAVIS, ADMINISTRATIVE LAW 761-63 (1951). The same authorities outline the general limits on the scope of mandamus, *e.g.*, to order "ministerial" but not "discretionary" action.

A considerable number of statutes permit all federal courts to exercise authority in the nature of mandamus as an aid to enforcement of certain of their provisions. These are listed in Note of the Advisory Committee to FED. R. CIV. P. 81(b), 28 U.S.C.A. (1950).

76. "Relief heretofore available by mandamus . . . may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules." This does not effect an increase in the jurisdiction of the district courts. See Marshall v. Crotty, 185 F.2d 622 (1st Cir. 1950); *Commentary*, 2 FED. RULES SERV. 676 (1940).

77. See Note, 38 COL. L. REV. 903 (1938); HART AND WECHSLER, *op. cit. supra* note 75, at 1186.

78. Smith v. Bourbon County, 127 U.S. 105 (1887).

79. See McGrimley v. Foley, 89 F. Supp. 10 (D. Mass. 1950), *aff'd*, 180 F.2d 1022 (1st Cir. 1950); Callaway County Agricultural Stabilization and Conservation Comm. v. Missouri Agricultural Stabilization and Conservation Comm., 122 F. Supp. 541 (W.D. Mo. 1954); New York Technical Institute of Md. v. Limburg, 87 F. Supp. 308 (D. Md. 1949); Feyerchak v. Hiatt, 7 F.R.D. 726 (M.D. Pa. 1948).

See also Reeber v. Rossell, 91 F. Supp. 108, 111, 113 (S.D.N.Y. 1950) and Farrell v. Moomau, 85 F. Supp. 125, 126 (N.D. Cal. 1949), discussed in note 51 *supra*.

itself, since it is difficult to distinguish the presumably unavailable remedy of *ordering* the postmaster to deliver mail and pay money orders from the relief which was held to be permissible, *enjoining him from refusing* to deliver and pay.

Actually, both the territorial limitation on the power to compel direct exercise of official authority as the primary relief granted, and the unique power of the District of Columbia court, are derived from historical circumstances, rather than from consideration of the current problems of judicial review.[80] There is no adequate reason for limiting plaintiff to suing in Washington, D. C., simply because the relief sought would require affirmative action by a superior. The case against a plaintiff who protests official action can be presented effectively in his own district.[81] Normally there should be no difference in this respect solely because the decree will require affirmative action. Certainly it is preferable to deny plaintiff local relief only in an exceptional situation where an effective defense cannot be made locally, rather than to enforce an unnecessary general ban. Of course, in some cases the real objection may be that the mandatory nature of the relief sought threatens excessive interference with Government activity. But then the basic issue should be only whether suit is to be permitted at all, not whether it should be limited to a particular court.

The Equities of Local Review

To determine the crucial issue of whether judicial review of federal administrative action should be centralized or localized, it is necessary to examine the practical consequences of each alternative. In most cases, since an administrative hearing has preceded the order protested, judicial review is limited to the paper record; thus the expense of transporting plaintiff and witnesses to the District of Columbia is not involved. However, substantial handicaps remain. Very likely, plaintiff was represented by counsel during the administrative proceeding, which is usually decentralized,[82]

80. See note 75 *supra*.

81. See text following note 84 *infra*.

82. Decentralization of administrative proceedings is, of course, extremely important, since it is at this stage that the plaintiff is required ordinarily to introduce the testimony or other evidence upon which he bases his protest. As would be expected, in situations where there is special statutory provision for local judicial review, see note 8 *supra*, either the statute or the regulations of the agency involved usually specify also that hearings be located with consideration to the convenience and necessity of the parties. See, *e.g.*, 17 Code Fed. Regs. §201.3(b) (1949) (Securities and Exchange Commission); 41 Stat. 1063 (1920), 16 U.S.C. §792 (1952) (Federal Power Commission).

Even in the situations with which this Note is concerned, in which judicial review was not specified by statute, the agencies' regulations usually provided that hearings be localized, at least on a regional basis. The Post Office Department, which formerly limited its hearing to Washington, D.C., as was the case in *Williams v. Fanning*, see text at note 10 *supra*, has amended its regulations recently to permit transfer to another location. "The hearing examiner shall grant or deny such application having due regard for the convenience and necessity of the parties." 39 Code Fed. Regs. §150.414(b) (Cum. Supp. 1954). Jeffries v. Olesen, 121 F. Supp. 463 (S.D. Cal. 1954) voided a fraud order on the ground that, in view of this regulation, it was a denial of "administrative procedural due process" to refuse to transfer the hearing to Los Angeles, the plaintiff's place of residence.

and he will be forced either to lose the services of the attorney most familiar with his case or to sustain the expense of the attorney's trip to the District of Columbia. If plaintiff retains new counsel in Washington, there will be probable added expense to compensate a local attorney for making the contact and corresponding with the new attorney to familiarize him with the case. Also, preparation of the argument may be hindered considerably if communication is limited to correspondence, and this lack of personal contact with his attorney may serve to intensify plaintiff's apprehension.

When extensive introduction of new evidence would be permitted,[83] and review is limited to the District of Columbia, the expense of transporting and maintaining himself and witnesses poses a severe and perhaps insuperable handicap for all but unusually affluent plaintiffs. Even for a moderate size business, it can be a considerable financial setback. The only alternative is reliance on the less forceful technique of depositions.

In contrast to the burdens on the plaintiff in the above types of situations, the Government is assured of effective legal representation. It has at its disposal, in addition to separate legal departments of many agencies,[84] the United States Attorney for each judicial district and the 485 authorized Assistant United States Attorneys [85] distributed among the districts.

83. This would be most likely when there is no prior administrative hearing at which plaintiff's case can be presented with reasonable completeness, as when Department of Labor officials attempt to enforce the Fair Labor Standards Act, against an employer; see Skinner v. Rogers, 100 F. Supp. 198 (N.D. Tex. 1951), *rev'd,* 201 F.2d 521 (5th Cir. 1953). Another example is 46 CODE FED. REGS. § 2.01-70 (1952), which provides only for filing of a written statement of grounds of appeal from enforcement of the Steamboat Inspection Laws; see Bryant v. Rucker, 111 F. Supp. 309 (S.D. Ala. 1953). Again, in Croton Watch Co. v. Laughlin, 208 F.2d 93 (2d Cir. 1953), the district court assumed jurisdiction before the controversy reached the Customs Court, 28 U.S.C. § 1583 (1952), and at this stage plaintiff presumably would have had an opportunity only to file a written protest with the local collector of customs as provided in 19 CODE FED. REGS. § 17.1 (1953). See also Carson v. Meador, 120 F. Supp. 260 (S.D. Cal. 1954) (petition for relief from federal parole supervision); Fite v. Payne, 91 F. Supp. 896 (N.D. Tex. 1950) (protest of local postmaster's classification of an area as residential); Feyerchak v. Hiatt, 7 F.R.D. 726 (M.D. Pa. 1948) (petition by federal prisoner for improved medical care).

Consider also the importance of evidence extrinsic to the adminstrative record, if plaintiff bases his protest on violation of his statutory or constitutional rights by the procedure which the agency followed.

84. The functioning of the Department of Justice in cooperation with administrative agencies was described as follows by Homer Cummings, then Attorney General of the United States: "Departments and other types of federal agencies have their own attorneys for the daily tasks of administration, such as the preparation of legal memoranda and the rendition of informal opinions. . . . Where imporant questions of law or differences of opinion arise, they are customarily referred to the Department of Justice. In cooperation, attorneys of other departments or agencies often assist the Attorney General or district attorneys in litigation.

". . .

"Greater variety of experience, increased resources, more numerous assistants, and the nation-wide network of district attorneys, marshals, and special agents versed in the local practice before the courts and local conditions have been made available to all government agencies through the Department of Justice." CUMMINGS AND MCFARLAND, FEDERAL JUSTICE 490-91 (1937).

85. See letter from Robert W. Minor, Acting Deputy Attorney General, dated October 29, 1954, on file in Biddle Law Library, University of Pennsylvania. For expression of opinion by courts that the Government could effectively defend locally,

However, by hypothesis, decentralization would increase the total number of suits. Although some of the legal staff perhaps could be shifted from the District of Columbia, there probably would be need for an increase in the number of Government attorneys. It does not seem, however, that the added cost need be very great even in absolute terms, and, compared to present total public expenditure in providing administrative and judicial hearing of allegedly improper agency action, the increase would be small.

In addition, decentralization presents an opportunity in at least some situations to eliminate entirely, not merely shift, certain costs, such as the expense attendant upon travel of a plaintiff and/or his witnesses. Witness expense would be reduced to a minimum, since the nature of the issues in the indispensability cases indicates that the important witnesses usually are located relatively near the plaintiff. Although the plaintiff's appearance in court would often be important, rarely would there be a need for superior administrative officials to participate personally. In many of the areas in which the indispensability question has arisen, the principal officer of the agency plays a minor role in the actual administrative determination, and that only in the last stages. As an example of this "institutional" method of decision,[86] the statute authorizing postal fraud orders specifies that the Postmaster General shall issue them "upon evidence satisfactory to him";[87] actually, his approval of an order is based entirely on findings of fact and recommendations of a hearing officer and the Solicitor of the Department,[88] and no doubt the latter himself relies heavily on his numerous assistants. There is little reason to believe that the Postmaster General gives more independent consideration to the evidence in the average case today than was shown by the opinion in *Pike v. Walker*[89] to have been the practice in 1941. There the Postmaster testified that he:

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see, *e.g.*, Pedreiro v. Shaughnessy, 213 F.2d 768 (2d Cir. 1954); Report of Proceedings in district court, Brief for Petitioner, Appendix p. 4, on petition for certiorari, Williams v. Fanning, 331 U.S. 797 (1947).

86. See, GELLHORN AND BYSE, ADMINISTRATIVE LAW 1073-134 (1954), for comprehensive analysis of the question through cases and other materials. See, COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 48-49 (1951): "The statute usually bestows authority upon a commission or the head of an agency, but these individuals cannot often perform personally the multifarious duties delegated to them. . . . There arises by clear necessity, in all the larger agencies, delegation of discretionary power within the personnel of the agency."

". . .

"Regardless of the [legal] limits on delegation to agency employees to pass finally upon matters of importance the fact remains that power to recommend the decision in any matter can be and ordinarily is so delegated. The distinction is more technical than practical. The higher officers are so little inclined to reverse the determination of their subordinates that the latter's recommendation often carries the weight to sway and determine final agency action in any close case, especially where the determination relates not to a general policy but to the decision of a particular individual case."

See also, PARKER, ADMINISTRATIVE LAW 101 (1952); Grundstein, *Subdelegation of Administrative Authority*, 13 GEO. WASH. L. REV. 144 (1944).

87. 26 STAT. 466 (1890), 39 U.S.C. § 732 (1952).

88. 39 CODE FED. REGS. § 151.25 (1949).

89. 121 F.2d 37 (D.C. Cir. 1941).

> ". . . satisfied himself that the recommendation had been signed by the Acting Solicitor, and thereupon signed and issued the order. He neither heard nor read any of the evidence, nor did he read or consider the appellants' answer or the brief filed in their behalf, and except that he 'glanced through several pages of the findings of fact and recommendation and thereby acquainted himself with the nature of the scheme,' he knew nothing of the controversy of his own knowledge." [90]

Realistically, it would be impossible for the Postmaster General to give detailed personal attention to the great multitude of matters for which his formal authorization is required by statute or regulation.[91] The same observation applies to the many other agency heads whose supervisory responsibility is both large and varied, for example, the Attorney General, who has been held indispensable in proceedings for suspension of deportation,[92] or the Secretary of the Navy, held indispensable in suits for reinstatement of civilian navy yard employees.[93]

Even if the superior's personal knowledge or judgment has been controlling in a particular administrative decision, it should be possible normally to defend that decision effectively in the plaintiff's district. In a deportation case, petition for reinstatement to employment, or other typical suit, the vital issues demand evidence as to plaintiff's characteristics, conduct, and analogous matters; there would be no necessity for the principal officer to participate personally in the proceeding. Of course, it would be reasonable to require the plaintiff to sue in the District of Columbia if he should insist that for his purposes personal appearance by the superior officer is necessary. And, if the court should find that exceptional circumstances of a particular case require the superior's presence for effective defense of the agency's position, again it would be reasonable to inconvenience the plaintiff in order to prevent serious interference with official activities.

A possible consequence of decentralized review is that temporary or permanent change in plaintiff's residence, after a successful protest of an agency order, could bring up the question again in the new district and produce an opposite result on the same facts. Examples would be aliens whose deportation had been enjoined [94] or merchant seamen whose exclu-

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90. *Id.* at 38.

91. See *Post Office Dep't*, REP. ATT'Y GEN. COMM. AD. PROC. 39-40 (1940). Duties supposedly committed to the personal attention of the Postmaster General range from comprehensive reformation of postal rates and classifications, if necessary to prevent excessive loss on service, 43 STAT. 1067 (1925), as amended, 45 STAT. 942 (1928), 39 U.S.C. § 247 (1952), to establishing "in places where . . . in his judgment, the public convenience requires it, receiving boxes for the deposit of mail matter. . . ." 39 CODE FED. REGS. § 50.17 (1949).

92. See cases cited notes 31-35 *supra.*

93. See Money v. Wallin, 186 F.2d 411 (3d Cir. 1951); Daggs v. Klein, 169 F.2d 174 (9th Cir. 1948).

94. See cases cited notes 22 and 23 *supra.*

sion from employment as security risks had been reversed.[95] However, the administrative officials should feel bound by the decision of the first court, at least as to that particular person, unless they can introduce significant new evidence.

As to the properly anticipated increased discrepancy which would arise as a result of interpretation of statutes and regulations and treatment of factual situations by various district courts and courts of appeals, the normal unifying influence of the federal appellate system would operate to adjust the differences. In addition, any serious amount of disruptive inconsistency in the arguments presented to the courts and the general policies followed in the various districts could be prevented by reasonably efficient cooperation between the agency involved and the Department of Justice, and within the latter.

Another argument against decentralization asserts that concentration of review in the District of Columbia promotes a higher degree of judicial expertise, which should in turn raise the quality of decision. It is extremely doubtful, however, that the types of cases here involved demand a special degree of expertness; their crucial issues seem, rather, to be of a type similar to those with which federal judges are familiar.

The Government argued in *Williams v. Fanning* that it would be handicapped if required to defend that kind of suit in the plaintiff's district, because of the time necessary for the local Government attorney to forward the complaint to the Department of Justice for authorization to defend, time needed by the agency to examine the complaint and prepare affidavits, and the customary failure to attach to the complaint for guidance of the local attorneys a transcript of the record and findings of fact at the agency hearing.[96] All these objections are susceptible to easy remedy if a statute authorizing local review conditioned it upon submission by plaintiffs of a satisfactory record of the case to date and allowance of the slight additional time which might be necessary for the Government because the suit was not at the Capital.

The basic answer to these arguments against general decentralization of judicial review is that any loss in the various respects claimed will be more than outweighed by the gain to plaintiffs, not only from their personal point of view, but also from the viewpoint of public interest in the fair administration of justice.

Legislation as a Solution

The limited mandamus authority of the local district courts would continue to pose an obstacle to local review, even if the Supreme Court were to abandon the *Williams* formulation and direct that no administrative official should be held indispensable unless his personal participation in the suit was shown actually to be essential. If, as is likely, the Court is

95. See Parker v. Lester, 112 F. Supp. 433 (N.D. Cal. 1953); note 53 *supra*.
96. Brief for Respondent, pp. 51-55, Williams v. Fanning, 332 U.S. 490 (1947).

not willing to change its approach so drastically, comprehensive legislation is probably the only means of achieving general decentralization without encouraging procedural manipulation in its most extreme form. In addition, legislation could establish a consistent procedure for all suits for review not controlled by a specific statute, thus clearing the area of the haze of fictions which have hindered plaintiffs and obscured the underlying substantive issues, and at the same time assuring adequate safeguards for effective defense by the agency.

It is suggested that the following be added to Section 10(b) of the Administrative Procedure Act: [97]

> Except as otherwise provided by Act of Congress, no suit for review of agency action brought in accordance with Section — of the Judicial Code [98] shall be dismissed for lack of jurisdiction over, or improper venue as to, any officer or employee of the United States or of any agency thereof, and a judgment in every suit so brought shall be binding on the agency and on every officer or employee of the United States or of any agency thereof.

The remaining suggested changes consist of provisions to be incorporated in the Judicial Code.[99] For the purpose of these provisions, "agency" and "agency action" should be defined to coincide with their meaning in the Administrative Procedure Act; [100] this involves a substan-

97. The provision could be added between the first and second sentences of the present § 10(b). 60 STAT. 243 (1946), 5 U.S.C. § 1009(b) (1952). Section 10 reads in part as follows:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and venue of action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

98. See text at note 99 *infra*.

99. 28 U.S.C. § 1 *et seq.* (1952).

100. "'Agency' means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law." 60 STAT. 237 (1946), 5 U.S.C. § 1001(a) (1952). The same section excludes specifically from the major provisions of the Act "agencies composed of representatives of the parties to the disputes determined by them," "courts martial and military commissions," "military or naval authority exercised in the field in time of war or in occupied territory," functions conferred by certain legislation scheduled to expire with the termination of World War II, and the functions conferred by the Selective Training and Service Act of 1940, the Contract Settlement Act of 1944, and the Surplus Property Act of 1944. "Agency" as used in the Judicial Code should exclude any of these authorities which are still operative.

"'Agency action' includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 60 STAT. 238 (1946), 5 U.S.C. § 1001(g) (1952).

tial change from the more conventional form of the general definition of "agency" in the Judicial Code.[101]

> 1. Except as otherwise provided by Act of Congress, every suit for review of agency action:
>
> (a) shall be brought against the agency; and
>
> (b) may be brought only in the judicial district where the party or any of the parties seeking review resides or carries on business, or in the District of Columbia, or in the judicial district in which the party or any of the parties seeking review has appeared personally or by representation in a proceeding before the agency or before any officer or employee thereof concerning the action sought to be reviewed; and
>
> (c) may be commenced only by filing in the district court a petition[102] for review of the agency action, which petition shall contain a concise statement of the nature of the action as to which relief is sought, the grounds on which relief is sought, and the relief prayed; and by delivering a copy of the petition to the United States Attorney for the district, or to an Assistant United States Attorney or clerical employee designated by the United States Attorney in a writing filed with the clerk of the court; and by sending a copy of the petition by registered mail to the Attorney General of the United States; and by sending a copy of the petition by registered mail to the agency whose action is sought to be reviewed.[103]

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101. "The term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense." 28 U.S.C. § 451 (1952).

Contrast with this the concept of the term "agency" as used in the Administrative Procedure Act:

"Whoever has the authority is an agency, whether within another agency or in combination with other persons. In other words agencies, necessarily, cannot be defined by mere form such as departments, boards, etc. If agencies were defined by form rather than by the criterion of authority, it might result in the unintended inclusion of mere 'housekeeping' functions or the exclusion of those who have the real power to act." H.R. REP. No. 1980, 79th Cong., 2d Sess. 19 (1946).

"The word 'authority' is advisedly used as meaning whatever persons are vested with powers to act (rather than the mere form of agency organization such as department, commission, board or bureau) because the real authorities may be some subordinate or semidependent person or persons within such form of organization." SEN. REP. No. 752, 79th Cong., 1st Sess. 10 (1945).

102. The statutes making special provision for local review, see note 8 *supra*, provide customarily that plaintiff file with the appropriate court a "petition" for review. Compare FED. R. CIV. P. 3: "A civil action is commenced by filing a complaint with the court."

103. To the extent applicable, this would supersede the existing provision for service upon an officer or agency of the United States, which is stated in FED. R. CIV. P. 4(d)(5).

2. In every suit required to be brought in accordance with Section 1, the district court shall, upon motion of the United States Attorney or the Assistant United States Attorney, grant such additional time, not in excess of five days, for filing any pleading or motion as shall appear clearly necessary by reason of unavoidable delay as a direct consequence of conducting the suit in a judicial district other than that in which is located the principal office of the agency whose action is sought to be reviewed.

3. In every suit required to be brought in accordance with Section 1, each district court shall have the same authority as the District Court for the District of Columbia to grant, on appropriate action or motion, relief in the nature of mandamus.

4. (a) A district court may transfer any suit brought in accordance with Section 1, if it shall find that:

(1) because of exceptional circumstances the testimony of the agency or of any member or members of the body comprising the agency [104] is absolutely essential to effective defense of the suit; and

(2) it is absolutely essential for effective presentation that this testimony be introduced personally, rather than through depositions; and

(3) personal appearance in the suit would interfere seriously with performance of official duties by the agency or the member or members of the body comprising the agency.

(b) The district court shall designate in its order of transfer the district in which the suit may be brought, which shall be the district in which the agency or the member or members of the body comprising the agency perform the major part of their official duties, and shall attach to the order a formal finding of fact as to the specific circumstances upon which the transfer is based.

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104. "Member or members of the body comprising the agency" also coincides with the terminology of the Administrative Procedure Act. 60 STAT. 239 (1946), 5 U.S.C. §1004(c) (1952).